MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

IBLA 87-238 Decided January 31, 1989

Appeal from a decision of the Assistant District Manager for Lands and Renewable Resources, Grand Junction District Office, Colorado, Bureau of Land Management, requiring payment of reappraised rental rate for com- munications site rights-of-way C-13068 and C-14913.

Vacated and remanded.

1. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

Where BLM adjusts the annual rental for a telecommuni- cations site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

APPEARANCES: Bruce G. Smith, Esq., Mountain Bell, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Mountain States Telephone and Telegraph Company (Mountain States) has appealed from a decision of the Assistant District Manager for Lands and Renewable Resources, Grand Junction District Office, Colorado, Bureau of Land Management (BLM), dated December 10, 1986, requiring the payment of a reappraised rental rate for two communications site rights-of-way, C-13068 and C-14913.

BLM issued rights-of-way C-13068 and C-14913 on May 8 and September 6, 1956, respectively, for a term of 50 years, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. | 961 (1976) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976)).

Right-of-way C-13068 initially included a telephone and telegraph line and a mobile radio telephone base station situated on Black Ridge in secs. 25 and 36, T. 11 S., R. 102 W., sixth principal meridian, Mesa County, Colorado. On October 5, 1976, BLM approved an amendment of the right-of-way to include additional equipment.

Right-of-way C-14913 issued for an auxiliary radio relay and repeater station and tower site situated in sec. 19, T. 13 S., R. 99 W., sixth principal meridian, near the town of Whitewater in Mesa County, Colorado. Subsequently, BLM approved a number of amendments of the right-of-way, two of which in 1983 were issued pursuant to Title V of FLPMA, 43 U.S.C. || 1761-1771 (1982). As amended, right-of-way C-14913 encompassed existing facilities and equipment and additional equipment, including a microwave dish, and an access road.

By decision dated May 20, 1963, BLM established the rental for C-13068 to be $200 for the 5-year period from January 1, 1964, to December 31, 1968. It increased that rental to $265 for the 5-year period from January 1, 1969, to December 31, 1973, by decision dated November 6, 1968. Thereafter, BLM attempted on a number of occasions to increase the rental for the site, but for various reasons there were no increases. However, in an August 5, 1986, decision, in which BLM assessed Mountain States at an annual rate of $58 for the 7-year period from January 1, 1980, to December 31, 1986, it also stated that, based on a January 24, 1986, reappraisal, annual rental would be $1,600, commencing January 1, 1987. BLM afforded Mountain States 30 days from receipt of the August 1986 decision to file a protest thereto and request a hearing.

In a decision dated May 23, 1963, BLM established the rental for the 5-year period from January 1, 1964, to December 31, 1968, for C-14913 to be $170. In a May 11, 1970, decision, the rental was increased for the period from January 1, 1969, to December 31, 1973, to $485. BLM also subsequently attempted unsuccessfully to increase the rental for C-14913. However, in an August 1, 1986, decision, BLM assessed Mountain States at an annual rate of $113 for the 6-year period from January 1, 1981, to December 31, 1986, and also stated that, based on a February 24, 1986, reappraisal, annual rental would be $1,600, commencing January 1, 1987.

BLM afforded Mountain States 30 days from receipt of the August 1986 decision to file a protest thereto and request a hearing.

On August 26, 1986, Mountain States protested the two August 1986 deci-sions and requested a hearing. The Assistant District Manager for Lands and Renewable Resources conducted a hearing on November 12, 1986, at which representatives for Mountain States and BLM appeared. Evidence and testi- mony offered at the hearing by Mountain States and BLM are briefly summa- rized in a December 10, 1986, memorandum to the file prepared by a BLM land law examiner, and an audiotape of the hearing is included in the case record.

By decision dated December 10, 1986, the Assistant District Manager concluded that Mountain States should be assessed annual rental in the amount of $1,500 for each of the two rights-of-way. He stated that

this figure "represents the fair market value of the rights Mountain States * * * has received to use and occupy the public lands for common carrier microwave relay use under the Comprehensive Master Appraisal for Communication Uses in Colorado." He required Mountain States to pay $1,500 in rental charges for each right-of-way for the period January 1
to December 31, 1987, within 30 days of receipt of the decision. The present appeal is from that decision.

The record indicates that, prior to the December 1986 decision, the Acting Chief State Appraiser, Colorado State Office, notified the District Manager, Grand Junction District Office, Colorado, in a November 12, 1986, memorandum, that during the summer of 1986, a State Office appraiser, Bud Curtis, had completed a Comprehensive Master Appraisal for Communication Uses in Colorado (Master Appraisal). He then stated:

> The subject right-of-way authorizations are both for com-
> mon carrier microwave relay use which is analyzed in the Master Appraisal at page 26, with an estimated annual fair market rental for this use in Colorado of $1,500.00.
>
> In fairness to Mountain States, I recommend you consider amending your rental decisions to reflect the $1,500.00 value conclusion of the August 7, 1986, Master Appraisal.

Attached to the November 1986 memorandum was a September 29, 1986, memorandum from the Chief State Appraiser to the State Director, Colorado, summarizing the results of the Master Appraisal and approving the report. The Chief State Appraiser stated, in that memorandum, that the Master Appraisal covered all rural telecommunications use rights-of-way issued pursuant to Title V of FLPMA, and determined the fair market rental value thereof as of August 7, 1986. He noted that telecommunications use rights-of-way had been grouped into six "essentially homogeneous" use categories and then compared with comparable "non-federal verified lease transactions," focusing on the "mid-range of the data." The Chief State Appraiser con- cluded that the data could be interpreted in various ways, but that the value determinations in the Master Appraisal were "supported by the major-ity of the market evidence." Each category of telecommunications use
was assigned an estimated annual fair market rental value amount. 1/

The record also contains Instruction Memorandum (IM) No. CO-87-2, dated October 7, 1986, in which the Colorado State Director notified deputy state directors and district and area managers that the rate schedule determined in the Master Appraisal could be used "for most telecommunication use autho-rizations in the state" and "will be applied to typical telecommunication use authorizations via memorandum from the staff appraiser referencing the

1/ The described uses and their assigned values are: television and radio broadcast use-$2,000; common carrier microwave relay use-$1,500; commercial communications use-$1,400; CATV--radio--TV translator use-$1,000; industrial and Governmental microwave or radio repeater use-$1,000; and passive micro- wave reflector use-$500.

Master Appraisal, and providing the appropriate classification and rent for the authorized telecommunications use." The rate schedule attached to IM No. CO-87-2 indicated that the appropriate rental rate for a common carrier microwave relay use authorization was $1,500 per year.

In its statement of reasons for appeal (SOR), appellant principally contends that BLM's reliance on the rate schedule in the Master Appraisal, in determining the appropriate rental for its communications site rights-of-way, constitutes a dramatic departure from the long-established and pre- ferred comparable lease method of appraisal. It argues that use of the Master Appraisal is contrary to FLPMA and its implementing regulations and was undertaken without adequate notice to and input from affected parties. Appellant specifically objects to the Master Appraisal to the extent it relied on (1) renegotiated private leases; (2) data from lease transactions outside Colorado; and (3) updated rentals utilizing the Consumer Price Index (CPI). It also criticizes the Master Appraisal for failing fully to identify the lease transactions relied upon.

Appellant concludes that proper application of the comparable lease method of appraisal, including reliance on other "comparable leases," results in a fair market rental value "substantially less than the amount determined by the BLM appraiser" (SOR at 3). 2/ Appellant requests that the Board reverse the December 1986 decision and remand the case to BLM "to determine the validity of the Master Appraisal and to consider additional evidence in the appraisal of * * * [rights-of-way] C-013068 and C-014913." Id. at 10-11.

Prior to repeal of the Act of March 4, 1911, communications site rights-of-way issued pursuant to that statute were subject to rental charges calculated on the basis of the "fair market value" of the right-of-way, as determined by a BLM appraisal. 43 CFR 2802.1-7(a) (1975). Fair market value has been considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976). The case records do not show that these communications site rights-of-way have been conformed to FLPMA by cancellation of the original right-of-way grant and issuance of a new right-of-way grant pursuant to Title V of FLPMA. 3/ See U.S. Steel Corp., 71 IBLA 88, 90 (1983).

2/ Although appellant has attached communication lease/purchase data to its statement of reasons in support of this claim, it does not state what the proper rental should be.

3/ Rights-of-way C-13068 and C-14913 have been amended on a number of occasions. However, there is no evidence in the case records that such amendments had the effect of canceling the original grant or conforming the entire grant to a FLPMA right-of-way, even though certain of these amendments purport to be issued pursuant to Title V of FLPMA, which was the applicable statutory authority in existence at the time of those amendments.

However, the regulations provide at 43 CFR 2801.4 that a right-of-way grant issued on or before October 21, 1976 (the date of enactment of FLPMA) shall be covered by the regulations in 43 CFR Part 2800, unless administra- tion under that part diminishes or reduces any rights conferred by the grant or the statute under which it was issued. Herein, the regulation at 43 CFR 2803.1-2(a), which provides for collection of fair market rental value, does not diminish or reduce the rights granted pursuant to the Act of March 4, 1911.

In its January and February 1986 appraisal reports, BLM appraised rights-of-way C-13068 and C-14913 using the comparable lease method of appraisal. Under that method, BLM determined the fair market rental value of those rights-of-way by reviewing the rental charges for other leases. That review accounted for differences between the subject rights-of-way and the other leases in terms of site characteristics, access, power, tenure, and time. The appraisal reports specifically relied on four leases in the vicinity of rights-of-way C-13068 and C-14913. Based on the comparison, as explained in those reports, the appraiser concluded that the fair market rental value of the subject rights-of-way was, in each case, $1,600.

The audiotape of the hearing at which appellant challenged the $1,600 annual rental indicates that, for the most part, the focus of the hearing was on the January and February 1986 appraisal reports. Subsequent to preparation of those reports, the appraiser retired, and he did not appear at the November 1986 hearing. BLM based its case solely on the testimony of Bud Curtis, the BLM appraiser who had prepared the Master Appraisal, and it was his conclusion that the appropriate annual rental in the case of appel-lant's rights-of-way was, in accordance with the Master Appraisal, $1,500.

In the December 1986 decision, BLM discussed certain issues raised
with respect to the January and February 1986 appraisal reports and admitted therein that "[t]he types of communication facilities in the comparables
are not the same type of use that Mountain States Telephone and Telegraph has for their sites. Comparables used in the appraisals should reflect similar use." Therefore, although BLM admitted error in those appraisals, it ultimately did not rely on them; rather it concluded that the rental charges should be $1,500, as set forth in the Master Appraisal.

[1] We will first address appellant's argument that the Master Appraisal constitutes a significant change from the comparable lease method of appraisal. As appellant correctly points out, the comparable lease method of appraisal has long been regarded by the Board as the preferred method for determining the fair market rental value of communications site rights-of-way. See, e.g., High Country Communications, Inc., 105 IBLA 14, 16 (1988); Harvey Singleton, 101 IBLA 248, 250 (1988); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978). We said in American Telephone & Telegraph Co., 25 IBLA at 358, that the comparable lease appraisal method should be employed "[i]n the absence of better evidence of market value."

The Master Appraisal itself states at page 5:

> Appraisal of fair market rental is best accomplished using the market comparison approach which relies on direct comparison with similar properties rented or leased for similar use. The Interior Board of Land Appeals has found the comparable lease method of appraisal to be the preferred method where sufficient comparable data is available.

The Master Appraisal is, in essence, a market study which involved a multi-state review of rental data for telecommunication facilities. In the common carrier microwave relay use catagory, BLM examined 14 Colorado leases and 34 leases in other western states. In table form, BLM set forth for each lease the month and year of issuance; annual rental; time adjusted annual rental; term of the lease; readjustment frequency; access rating; power availability; single or multiple user location; size; whether urban or rural market; and topography (Master Appraisal at 29-34). In a summary, BLM discussed the data set out in the table for each factor in the category and concluded:

> A total of 48 leases in eight states ranged from $19,600 to $300 in this use group and averaged $2475. Over half had a time adjusted rental between $1000 and $2500. Twenty-five leases in this mid-range averaged $1756. More weight is given multi-state leases in this group due to the network systems broad regional geographic expanse.
>
> All factors considered, the estimated annual fair market rental for a typical BLM or Forest Service permit for common carrier microwave relay use in Colorado is $1500.

(Master Appraisal at 26-28).

The Master Appraisal, thus, established an estimated fair market rental value for rights-of-way used for common carrier microwave relay. While BLM compared the various factors for the leases used in the report, there is no evidence that appellant's rights-of-way were compared with any of the particular leases included in the report. The thrust of BLM's analysis regarding the fair market rental value for appellant's rights-of-way may be expressed as follows: the Master Appraisal estimates the fair market rental value for common carrier microwave relay sites at $1,500; appel-lant's rights-of-way are for common carrier microwave relay use; therefore, appellant's fair market rental value is $1,500. That is not a comparable lease method of appraisal, and we agree with appellant that use of the Master Appraisal in the fashion in which it was utilized in this case constitutes a significant departure from the comparable lease method of appraisal. 4/

4/ In High Country Communications Inc., supra at 16, the Board character- ized the approach used to establish the rental in that case by utilizing the Master Appraisal, therein referred to as the CTUA (Colorado Telecommuni-cations Use Appraisal), as the "going rate" method of valuation.

The question which arises is whether the shift in valuation procedure is justified. In its explanation of the purpose and function of the Master Appraisal, BLM stated that "[t]he appraisal will provide a basis for estab- lishing rental rates which will expedite processing most telecommunication site R/W applications, and substantially reduce costs associated with indi- vidual case-by-case appraisal" (Master Appraisal at 1). Expediting process-ing and reducing costs are laudable goals; however, achievement of those goals must be weighed against whether or not the results thereof are fair to right-of-way applicants and holders and, in fact, result in a determination of fair market rental value.

Based on the present record, we are unable to determine whether appli- cation of the Master Appraisal resulted in a fair market rental valuation for appellant's rights-of-way, but we can conclude that BLM's application
of that appraisal to appellant's rights-of-way in this case was unfair and improper.

Appellant objects to the Master Appraisal because it was adopted with- out notice to affected parties. We know of no statute or Department regu-lation which requires BLM to notify current and/or potential right-of-way holders that it intends to apply a specific method for appraising communi- cations site rights-of-way or to alter or deviate from an accepted method. We have observed, however, that BLM's development of an appraisal method may in certain circumstances benefit from public input. See Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46, 50 n.5 (1983). 5/ In addition,
BLM must insure that any methodology be uniformly applied. As we noted in Northwest Pipeline Corp. (On Reconsideration), supra at 49-50, in order to achieve uniformity and consistency regarding determination of fair market value for linear rights-of-way, BLM assembled a study team to develop and recommend an acceptable method of estimating fair market value for such rights-of-way.

5/ The Northwest Pipeline case involved BLM's use of the going rate method of appraisal for natural gas pipeline rights-of-way. The record developed before the Board indicated inconsistencies in the use and application of the going rate method between BLM state offices which had prompted BLM to form
a study team designed to develop and recommend an acceptable approach. In light of these facts, we set aside the BLM decisions appealed from which
had relied on the going rate method and remanded the case to BLM. Subse- quent thereto, BLM published in the Federal Register notice of intent to propose rulemaking and proposed regulations in order to address the question of the proper appraisal method for natural gas pipeline and other linear
rights-of-way. See 49 FR 19049 (May 4, 1984) and 51 FR 31886 (Sept. 5, 1986). Final rules were promulgated, effective Aug. 7, 1987. See 52 FR 25811 (July 8, 1987).

On July 28, 1988, the Rocky Mountain Region, Forest Service, U.S. Department of Agriculture, published a notice of proposed policy regarding the determination of rental fees for communication uses on National Forest System lands in that region, which includes the State of Colorado. 53 FR 28609 (July 28, 1988). Therein, the Forest Service proposed a fee sched-
ule for various use categories similar to that set forth in BLM's Master Appraisal.

We agree with appellant, however, that the Master Appraisal is fatally flawed by the fact that it fails to disclose the location of private lease transactions and the parties thereto, such that appellant could verify the data obtained. BLM states in the Master Appraisal at page 8: "A summary of lease data is included for each type or group of market rentals. Maps are not included to protect the confidential nature of market data. Lessor and lessee names have also been withheld to protect confidential informa-tion obtained." BLM provides no legal basis for its determination to with- hold the information it has described as "confidential," nor are we familiar with any. Therefore, we must conclude that failure to disclose the loca-tion of the lands covered by the private leases and the identity of parties to those lease transactions relied upon by BLM in the Master Appraisal precludes independent verification of that lease data and, thus, prevents any effective challenge to the accuracy of the data on appeal, as well as any meaningful review by the Board. Cf. Southern Union Exploration Co., 51 IBLA 89, 92 (1980) (decision rejecting competitive oil and gas lease high bid must be supported by record showing the factual basis for the deci-sion sufficient to provide the bidder with the information necessary to understand and accept the rejection or, alternatively, appeal and dispute the determination, and the information must be part of the public record and adequate such that the Board is able to judge its correctness on appeal). Thus, the Board has no way of determining whether $1,500 represents the fair market rental value for the rights-of-way in question.

In addition, without the essential data used to compile the Master Appraisal, it is impossible to verify that the leases utilized by BLM under the Master Appraisal category of common carrier microwave relay authorize the same telecommunication uses as appellant's rights-of-way. As noted supra, authorized telecommunications use of right-of-way C-13068 was as a mobile radio telephone base station and of right-of-way C-14913 was as a radio relay and repeater station.

Furthermore, even if BLM had disclosed such information as part of the Master Appraisal, the Master Appraisal would not support BLM's action in this case. BLM must provide some analysis of the relationship of the subject rights-of-way to the Master Appraisal data to justify application of the Master Appraisal amount. BLM states in the Master Appraisal at page 3 that "an individual appraisal will be completed for any use authorization for which there is convincing evidence to indicate that such an appraisal is warranted to arrive at a fair market rent." In this case, BLM provided no analysis, in the first instance, of how appellant's rights-of-way compared with any particular information from the Master Appraisal. Thus, it effec- tively deprived appellant of any meaningful opportunity to establish that an individual appraisal was necessary.

Although we have accepted appellant's argument regarding the lack of disclosure of critical information in the Master Appraisal, other specific objections to that document must be rejected. Appellant contends that BLM relied, in part, on renegotiated private leases despite the stricture in American Telephone & Telegraph Co., 77 IBLA at 119, that such leases "should not be used as comparable leases." However, as we explained in that case, where the rental charges for renegotiated private leases are essentially corroborative of the charges for new private leases, consideration of the

renegotiated leases "adds nothing of substance to the appraisal process." Id. Correspondingly, consideration of renegotiated private leases in such circumstances does not detract from the appraisal process or skew the determination of fair market rental value. The Master Appraisal stated, at page 7, that "[r]enegotiated lease prices do not appear to differ significanly from new lease prices." Thus, if renegotiated lease prices merely confirm new lease prices, their use is not improper.

Appellant also argues that BLM improperly updated rental charges in private leases using the CPI in order to adjust for the elapsed time between the dates of the lease transactions and the date of the valuation. Appel- lant asserts that private lessors and lessees may already have accounted for inflation in their rental charges, e.g., in the case of a 5-year term, setting a flat rate which "may be high for the first few years and low for the last few years" (SOR at 7). Appellant also argues that BLM implicitly discounted use of the CPI in proposing use of the "Gross National Product Implicit Price Deflator Index" to adjust for annual changes in the rate schedule proposed for natural gas pipeline and other linear rights-of-way, as set forth in proposed rulemaking and adopted in final rulemaking. See note 4, supra. However, nothing in the proposed rulemaking indicates that the CPI is not also a reliable indicator of the impact of inflation or deflation on rental charges for communications site rights-of-way, and, thus, should not be used to "update" rentals charged in private leases. Moreover, the CPI was apparently selected because annual changes in the rental charges for private leases relied upon by BLM were generally tied to the CPI (see Memorandum to State Director from Chief State Appraiser, at 3). Thus, we find no error in use of the CPI by BLM, where sufficient evidence exists that use of an index is necessary.

Next, appellant objects to BLM's reliance on private lease transactions from outside of Colorado. Generally speaking, in employing the comparable lease method of appraisal, BLM appears to rely on data obtained from private lease transactions within the particular state, or even within the partic- ular region of the state, where the subject right-of-way is situated. How- ever, it does not necessarily follow that the market forces determinative of the fair market rental value of a given right-of-way are confined by state or regional boundaries. Thus, we can find no general objection to the use of market data from other western states, where such data is reflective of the fair market rental value of comparable rights-of-way in Colorado. 6/

6/ We note that, in the Master Appraisal at page 5, BLM stated that it generally relied more on Colorado transactions in arriving at its esti- mated annual fair market rental values. However, in the summary section for common carrier microwave relay uses, BLM stated that "[m]ore weight is given multi-state leases in this use category due to the network systems [sic] broad regional geographic expanse" (Master Appraisal at 28). It is not clear from the Master Appraisal exactly what effect assigning "more weight" to "multi-state" leases had on BLM's valuation for this use category.

Thus, we conclude that the Master Appraisal could not properly serve as the basis for establishing the annual rental for appellant's rights-of-way. BLM may utilize the information compiled in the Master Appraisal for the purpose of establishing the fair market value of those rights-of-way, but not without the record disclosure of the background information for the leases, as well as a reasoned analysis of how and why the rights-of-way subject to appraisal are comparable to the information utilized. 7/ What- ever information is employed by BLM to determine the fair market annual rental for appellant's rights-of-way must be communicated to appellant and made a part of the record in this case.

The hearing held in November 1986 focused on the two appraisals that BLM admitted improperly relied on leases which were not comparable, and BLM based the December 1986 decision on the Master Appraisal which we have found defective. Thus, whenever BLM recalculates the rental for the two rights-of-way in question, appellant is entitled to notice of the readjusted rental and an opportunity for a hearing in accordance with American Telephone & Telegraph Co., 57 IBLA 215 (1981), since appellant's rights-of-way have not been conformed to FLPMA rights-of-way.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for further action consis- tent herewith.

Bruce R. Harris
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

7/ In High Country Communications, Inc., supra at 17, the Board specifi-cally rejected BLM's valuation method and remanded the case to BLM to conduct an appraisal utilizing the proper appraisal method.